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NO. 78-1524

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

EARNEST JACKSON, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit

REPLY BRIEF OF PETITIONER

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The Petition filed herein presents 5 issues of substantial importance. These issues involve, in our judgment, some serious constitutional aspects. The Respondent's position distills into the rather conclusory assertion that the opinion rendered by the appellate court should be ratified on general principles.

Since the arguments made by Respondents are so general, it is our judgment that the arguments made in the Petition

should at least prevail to the point of requiring this Court to take a closer look at this cause. In our judgment, if this is done there is simply no way Petitioner's remaining conviction can survive.

Despite this belief, the arguments made by the Respondent (Brief in Opposition, p. 10) against our Issue No. IV merit a specific response for a number of reasons. Here we start with the Respondent's rather flat statement, used as a critical premise in its elusive reasoning pattern, to the effect that "the declarant [who provided highly critical evidence in this case] was adequately shown to have been a participant in the [charged] conspiracy to distribute heroin" (ibid).

The most glaring flaw in the quoted assertion is not the fact that the indictment charged Jackson and Porter as the only alleged conspirators. The chief flaw stems from the Government's concession at the trial that the witness Johnson, who parrotted statements attributed to this possibly phantom declarant, was not to be regarded as a conspirator. (Indeed, as the Fifth Circuit expressly recognized in its Opinion, "The government considered her to be an innocent participant....") (Fn. 4.)

All this being so, we have here a situation where an unnamed and unknown female person can be bootstrapped into a conspiratorial relationship with other parties solely on the basis of statements attributed to her by a nonconspirator. But, even this is not all. Although only the name of one of two charged conspirators is mentioned (here, Porter),

the statement can be regarded as having been made in furtherance of an uncharged conspiracy between the declarant (here, the unknown party), the party named in the conversation and another party--here, this Petitioner.

To be sure, this is the ultimate reach of the Respondent's ratiocinations. For, if it were otherwise, the Government surely would not have tried to convince this Court the contents of an assertion imputed by this nonconspirator to an unknown party, could not only be regarded as proof such statements were, in fact, made; but could be regarded as "independent proof" that was "sufficient to establish by a preponderance of the evidence that there was an illicit association between the declarant and the other conspirators." (Brief In Opposition, p. 10.)

The further point urged by the Government is that no limiting instruction was required. And, for that reason, the need therefor was waived. As to this, it may suffice here simply to point out that the trial court could not possibly have allowed this evidence for the reason now being urged by the Government. For, lest we forget, the Government has denied the witness was a conspirator, and there was no contention made that the declarant was. This being so, the belated contention now being urged by the Government, that there was a waiver of any right to a limiting instruction, is really a desperation argument. (Brief In Opposition, p. 11, fn. 5.) One that really emphasizes the Government's unwillingness to adopt the

position taken either by them in the Fifth Circuit, or by the Fifth Circuit in its opinion. For, as footnote 4 of the Court's opinion (Appendix to Petition, at pp. 78-79) shows, the Court ruled the assailed evidence was admissible on the farfetched theory that it was explanatory of a nonverbal act.

CONCLUSION

In our judgment, a review by this Court will inevitably result in the apt determination that the Government's argument, on the points dealt with above, translates into an invitation for this Court to deny the Petition here on general principles. For, it is not only a fact that the Fifth Circuit tried to justify the admission of the specifically assailed evidence on a theory that obviously had not occurred to either the Government or the trial court[1/]; it is also a fact that the theory the Government now advances pales into insignificance upon analysis.

For all of these reasons, this Court ought to grant the Writ being sought herein.

Respectfully submitted,

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1/ See United States v. Check, 582 F.2d 668, 683 (2d Cir. 1978) and Shepard v. United States, 290 U.S. 96, 102-103 (1933). Both of these cases are heavily relied on in the Petition (at pp. 50-54).

CERTIFICATE OF SERVICE

It is hereby certified that copies of the Petitioner's Reply Brief were mailed to the offices of the following opposing counsel this ___ day of June, 1979:

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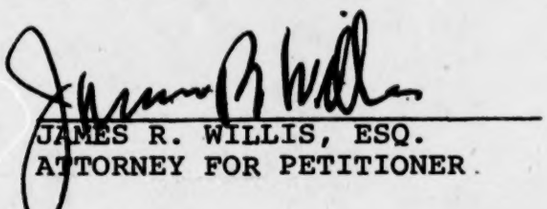

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